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K-C Ref. No. 19441

In re Application of:

David A. Fell et al.

Serial No.: 10/732,913

Filing Date: December 10, 2003

For FOLD LINE RESITANT
ABSORBENT ARTICLES

Examiner: Michael G. Bogart

Group Art Unit No.: 3761

Confirmation No.: 6819

REPLY BRIEF

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is in response to the Examiner's Answer filed on May 29, 2008.

REPLY TO EXAMINER'S ANSWER

Appellants have chosen to address selected particular points of the Examiner's Answer, as many of the Examiner's arguments repeat the final rejections and thus are addressed in Appellants' Appeal Brief. Therefore, the lack of a specific response to a point raised in the Examiner's Answer is not a concession of the rejection. Rather, Appellants' position may be found in the Appeal Brief filed on February 27, 2008.

ARGUMENT

I. The Examiner has failed to show that the improper combination of *Mason et al.* and *Lee et al.* discloses all the limitations of claim 10-13

Independent claim 10 requires an absorbent article that resists creasing, even after having been packaged in a double or tri-folded configuration. The claim further requires an absorbent core, when subjected to a folded condition and released to an unfolded condition, resists permanent creasing. The Examiner argues that the combination of *Mason et al.* and *Lee et al.* disclose all of the claimed elements of the present invention. (See Examiner's Answer, p. 4-7). However, the Examiner's argument is incorrect and this rejection should be reversed.

As Appellants have stated in their appeal brief, *Mason et al.* teaches the use of a "flexibly stiff, springy, substantially nonelastic reinforcing member that extends generally around the periphery of the pad." (See Appeal Brief, p. 7). The Examiner argues that the Applicants' assertion that it would not have been obvious to use the reinforcing member of *Mason et al.* with the claim invention is unpersuasive because as applied, *Mason et al.* in view of *Lee et al.* is applied to disclose or suggest the elements of the claimed invention. (See Examiner's Answer, p. 13.) Furthermore, the Examiner states that it "whether it would have been obvious to combine a discrete element of *Mason et al.* with the claimed invention is not relevant." (*Id.*) However, in support of the rejection, the Examiner has argued that the reinforcing member is equivalent the activating member of the claimed invention. (See *id.*, p. 4). Furthermore, *Mason et al.* is the primary reference, and the Examiner only combined the teachings of *Lee et al.* because *Lee et al.* discloses an individually wrapped absorbent article. (See *id.*, p. 6). In other words, the Examiner presents a contradictory argument by equating a claimed element

with a feature disclosed in the prior art, while also arguing that the substitution of that feature into the claimed device is not relevant. Thus, the Examiner's argument is essentially that *Mason et al.* discloses all of the claimed elements of the present invention except the packaging material. Accordingly, it is very relevant whether one of ordinary skill in the art would use the reinforcing member disclosed in *Mason* with the claimed invention.

Mason et al. discloses that the reinforcing member is directed to maintaining the overall shape of a pad and is desirably located in the crotch section of the pad, where shape retention is most desired. Moreover, the positioning of the reinforcing member in the crotch region of the pad minimizes any stiffness in the ends of the pads. (col. 3, ll. 40-46). These characteristics are counter-intuitive to the claimed invention, where the activating member is positioned in areas beyond the crotch region, in order to insure that when the absorbent article is double or triple folded and inserted into a packaging component, the article is resistant to creases at all of the fold line areas. Furthermore, *Mason et al.* fails to teach or disclose an absorbent core that "is positioned and maintained in [a] folded condition under 2800 psi of . . . pressure" and resists permanent creasing. The Examiner argues that *Mason et al.* teaches that the reinforcing member is "willowy" and is thus resistant to creasing. (See Examiner's Answer, p. 15). *Mason et al.* teaches and discloses that the reinforcing members help resist bending and twisting when in use, generally in the longitudinal direction. (col. 2, l. 63 – col. 3, l. 2). *Mason et al.* further teaches that such bending and twisting may be caused by the "body movement of the wearer which deforms the pad such that it is no longer properly placed to absorb fluids." (col. 1, ll. 24-26). Thus, one of ordinary skill in the art would understand the reinforcing member disclosed by *Mason et al.* would prevent bending and twist due to body movement. However, one of ordinary skill in the art would not understand that the reinforcing member, which may be manufactured from such materials as a spring wire, plastic-coated spring steel wire, and mid-density polyethylene members, would prevent a permanent crease when subjected to 2800 psi of folded pressure.

Moreover, *Mason et al.* teaches that the absorbent material is manufactured from conventional materials, such as wood fluff, conform, polyesters, and meltblown

propylene. (Col. 6, ll. 50-65). Thus, even if the device disclosed in *Mason et al.* was able to be combined with the packaging taught by *Lee et al.*, there is no guarantee that the absorbent, itself would not maintain a permanent crease. The prior art can be modified or combined to reject claims as *prima facie* obvious as long as there is a reasonable expectation of success. MPEP 2143.02 in reference to *In re Merck & Co., Inc.*, 800 F.2d 1091 (Fed. Cir. 1986). The use of the reinforcing member disclosed in *Mason et al.* with the claimed invention does not have a reasonable expectation of success because the absorbent is manufactured using conventional materials. This is supported by the test data provided in the specification of the application as filed. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315, 75 U.S.P.Q.2d 1321, 1327 (Fed. Cir. 2005) (the specification is the best guide to interpreting the claims).

The addition of *Lee et al.* teaches nothing that would remedy the deficiencies mere fact that the combination of references teaches every element of the claimed invention, without motivation to combine, is insufficient to establish a *prima facie* case of obviousness. MPEP 2143.01, with reference to *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998).

II. The Examiner has failed to show that the improper combination of *Rainville-Lonn* and *Lee et al.* discloses all the limitations of claim 10-13

The Examiner argues that the combination of *Rainville-Lonn* and *Lee et al.* disclose all of the claimed elements of the present invention. (See Examiner's Answer, p. 7-10). The Examiner asserts that the Applicants' argument stating that *Rainville-Lonn* does not suggest to one of ordinary skill in the art that the disclosed pad would withstand the creasing when subject to the pressure recited by the claimed invention was not persuasive. (See *id.*, p. 14). The Examiner supports this assertion by stating that that *Rainville-Lonn* teaches that the resilient core is made of a resilient material, such as a low density foam. (See *id.*). However, the Examiner's argument is incorrect and this rejection should be reversed.

Rainville-Lonn teaches the use of an absorbent article with a raised peripheral wall, which is elevated to prevent the absorbent layer in the concavity of the absorbent pad from coming into contact with skin of the person (p. 1, ¶ 0008). *Rainville-Lonn* fails to suggest to one of ordinary skill in the art that the disclosed pad would with stand the

creasing when subjected to the pressure recited by the claimed invention. The resilient core to which the Examiner refers is not a part of the absorbent layer as taught by *Rainville-Lonn*. On the contrary, this resilient core is part of a contour rib, which sandwiches the absorbent layer of the device in *Rainville-Lonn*. (p. 2, ¶ 0019). The contour rib is configured to provide comfort to the user. (p.2, ¶0017). The absorbent layer, on the other hand, is typically chosen amongst conventional high-absorption materials, such as polyester. (p. 2, ¶ 0019). Thus, *Rainville-Lonn* fails to teach or suggest an absorbent core that would withstand the creasing when subjected to 2800 psi of pressure, as stated by the claimed invention. Accordingly, one of ordinary skill in the art would not have folded the disclosed pad into an individual packaging and expected it to resist permanent creasing. Therefore, in view of the current amendments, the test data discussed in the specification, and the foregoing remarks, Appellants respectfully request the Board to reverse the instant rejection.

III. The Examiner has failed to show that the improper combination of *Rainville-Lonn*, *Mason et al.* and *Lee et al.* discloses all the limitations of claims 14 and 16-21

Claims 14 and 16-21 have been finally rejected under 35 U.S.C. § 103 in view of *Rainville-Lonn* and further in view of *Mason et al.* and *Lee et al.* Independent claims 10 and 16 include an absorbent core that is resistant to permanent creasing. As discussed above, none of the references teaches or suggests, either alone or in combination, that the disclosed articles would withstand the recited pressure tests without forming a permanent crease or breaking. Therefore, Appellants respectfully request this rejection be reversed.

IV. The Examiner has failed to show that the improper combination of *Rainville-Lonn*, *Mason et al.*, *Lee et al.*, and *Tanzer* discloses all of the limitations of claims 15 and 22-24

Claims 15 and 22-24 have been finally rejected under 35 U.S.C. § 103 in view of *Rainville-Lonn*, *Mason et al.*, *Lee et al.* and further in view of *Tanzer*. As discussed above none of the references teaches or suggests, either alone or in combination, that the disclosed articles would withstand the recited pressure tests without forming a permanent crease or breaking. The Examiner argues that the

Applicants statement that *Tanzer* does not remedy the deficiencies of *Rainville-Lonn*, *Mason et al.*, and *Lee et al.* is not persuasive. However, this argument is flawed. *Tanzer* does not teach or suggest the use of an activating member to create independent movement of a folded article from a folded condition to an unfolded condition or the use of a packaging component with the disclosed article. *Tanzer* does not disclose a folded article at all, but rather a diaper, presumably not packaged in individual wrappers. In fact, the Examiner admits that the only reason *Tanzer* was applied as a reference was to show an absorbent article with an open-celled foam layer over superabsorbent. (See Examiner's Answer, p. 16). Thus, the Examiner concedes that *Tanzer* does not disclose the claimed invention. Every teaching of *Tanzer* would have led one of skill in the art away from the claimed invention and would not have made it obvious in view of it. Appellants respectfully request this rejection reversed.

CONCLUSION

Accordingly, the rejection of claims 10-24 should be REVERSED.

Respectfully submitted,

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